ALEXANDER L.
CLERK

No. 80-1303

In the Supreme Court of the United States

October Term, 1980

THE POTOMAC EDISON COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

When the courts of Pennsylvania determined that the Appellant was not entitled to exclude from the base of the Foreign Franchise Tax the value of assets used in generating electricity because of its failure to qualify for manufacturer's exemption contained therein, was the Equal Protection Clause of the United States Constitution violated so as to present in this appeal a substantial federal question?

If a substantial federal question is presented, has the Appellant properly preserved its right to appeal to the United States Supreme Court when the Appellant limited the constitutional violations raised in its exceptions to the Commonwealth Court's opinion to the question of whether or not the "right of eminent domain, its enjoyment and exercise were relevant or material to this case"?

Since the decision appealed from is adequately based on non-federal law, i.e., that for Pennsylvania corporate tax purposes the generation of electricity is not manufacturing, should not this appeal be dismissed or affirmed?

MOTION TO DISMISS OR AFFIRM

Appellee moves that the present appeal be dismissed or that the final judgment of the Supreme Court of Pennsylvania be affirmed on the grounds in the alternative that: (1) the appeal does not present a substantial federal question; (2) that the federal question submitted by the Appellant was not properly raised in Appellant's appeal to the Pennsylvania Supreme Court and not expressly passed on by that Court; or (3) the judgment entered by the Commonwealth Court of Pennsylvania and affirmed per curiam by the Pennsylvania Supreme Court rests on an adequate non-federal basis.

STATEMENT OF THE CASE

The Commonwealth accepts in part the facts as stated in Appellant's Jurisdictional Statement. Obviously, the Commonwealth does not accept the many conclusions of law contained therein. For example, Appellant's statements that his expert witness's testimony proved that the Appellant's activities constituted manufacturing for Pennsylvania tax purposes. The Commonwealth submits that the generation of electricity at the Appellant's plant in Pennsylvania is not manufacturing for Pennsylvania corporate tax purposes in accordance with the holding of the Commonwealth Court's opinion stated on page 9A of Appellant's Jurisdictional Statement, to wit:

> "We now hold, after a careful review of the applicable law, the parties stipulations and the testimony at the evidentiary hearing, that an electric company is not entitled to the manufacturing exemption because the production of electricity is not manufacturing."

This appeal can only be allowed if the decision by the Pennsylvania Supreme Court that activities of the Appellant do not constitute manufacturing as that term is used in Pennsylvania corporate taxation violated the Equal Protection Clause of the United States Constitution and, therefore, presents a substantial federal question.

Appellant's assertion that the Capital Stock Tax, which is the companion tax to the Foreign Franchise Tax here involved and which is applicable to the domestic corporations, is not involved in this appeal is without merit.

The same manufacturing exemption exists for both taxes, and a decision in a Foreign Franchise Tax case that a particular activity is manufacturing would necessarily affect the question of what is manufacturing for the other tax.

Alternatively, if a substantial federal question is presented, Appellant has not properly preserved it in that its exceptions limited its constitutional objections to the question of whether or not the Appellant enjoyed or exercised the power of eminent domain in Pennsylvania. Neither the Commonwealth Court nor the Pennsylvania Supreme Court determined or even considered this issue in reaching their decision.

SUMMARY OF ARGUMENT

Courts of Pennsylvania have consistently held since 1891 in the *Northern Electric case,* infra, that electric generating companies were not entitled to the manufacturer's exemption contained in Pennsylvania corporate taxes. The denial of the manufacturer's exemption to electric generating companies has been applied to all domestic and foreign electric generating companies without exception. Because the denial has been consistent and applied to both foreign and domestic companies, the Commonwealth submits that the Appellant's appeal in the instant case does not present a substantial federal question that should be reviewed by the United States Supreme Court.

An additional reason to dismiss or affirm Appellant's appeal in the instant case is that Appellant has not properly preserved its potential federal question in this matter. The Appellant limited the constitutional question of equal protection to the issue of "eminent domain." Since this issue was not germane to the holding in this case, the question of equal protection has not been properly preserved.

Additionally, the decision of the Pennsylvania Commonwealth Court sustained by the per curiam opinion of the Pennsylvania Supreme Court is adequately grounded on non-federal law.

ARGUMENT

A. The Equal Protection Clause of the U. S. Constitution, Appellant's only grounds for presenting a federal question on appeal, is not violated by the decision of the Pennsylvania Supreme Court in the instant case.

The Tax Reform Code of 1971, Act of March 4, 1971, P.L. 88, No. 2, Art. VI, Section 601 et seq., 72 P.S. 7601 et seq. pp., sets forth the provisions of the Capital Stock-Franchise Tax, and it provides in pertinent part:

"Article VI Capital Stock Tax-Franchise Tax

"Part 2. Imposition of tax

"(a) That every *domestic corporation* . . . shall be subject to, and pay . . . a tax . . . , upon each dollar of the actual value of its whole capital stock of all kinds, . . . Provided, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, . . . organized for manufacturing, . . . which is invested in and actually and exclusively employed in carrying on manufacturing, . . .

"(b) Every *foreign corporation*, . . . shall be subject to and pay . . . , a franchise tax . . . upon a taxable value. . . Provided, That the manufacturing, . . . exemptions as contained under section 602(a) shall also apply to foreign corporations and in determining the relevant apportionment factors the numerator of the property, payroll, or sales factors shall not

include any property, payroll or sales attributable to manufacturing, . . . activities in the Commonwealth." (Emphasis supplied.)

The amendment of July 1, 1978, P.L. 594, added the following:

"The provisions of this article shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing, processing, research or development purposes, but shall not apply to such companies as enjoy and exercise the right of eminent domain."

Both section (a) with respect to domestic corporations and section (b) dealing with foreign corporations exempt manufacturing activities from the tax imposed. Since the decision in this case treats foreign and domestic corporations substantially the same for purposes of Pennsylvania corporate taxation, there is no question of discrimination between foreign corporations and domestic corporations, hence no violation of the Equal Protection Clause found in the 14th Amendment to the United States Constitution on this ground. Appellant's contention that the denial to it of the manufacturing exemption by the Pennsylvania courts applying a different definition of "manufacturing" than has been uniformly applied for over 50 years to all other taxpayers claiming the exemption results in a violation of the Equal Protection Clause is spurious and without merit. The Commonwealth submits that the Pennsylvania courts have consistently applied the exemption as it has developed through a long series of court cases in a fair and equal manner.

The Foreign Franchise Tax, supra, is a privilege tax imposed by the Commonwealth on foreign corporations

which do business in Pennsylvania. The Capital Stock Tax is a property tax imposed upon domestic corporations engaged in business in the Commonwealth. Both of these acts exempt from the tax imposed therein assets used in manufacturing. This so-called "manufacturer's exemption" has been a part of the Pennsylvania law for many years.

The term "manufacturing" in the corporate tax acts has not been defined by statute necessitating the courts of Pennsylvania to define the term. See *Commonwealth v. Deitch Co.*, 449 Pa. 88, 295 A.2d 834 (1972), where the Pennsylvania Supreme Court said:

> "The element of difficulty in this and other cases dealing with the capital stock tax [or franchise tax] manufacturing exemption arises from the absence of any statutory definition of the term 'manufacturing.'
>
> "This definitional vacuum has been filled by a judicial definition of the term which has emerged from a long line of cases extending back over 100 years' time. . . ." *Commonwealth v. Deitch Co.*, 449 Pa. 88, 92, 295 A.2d 834 (1972).

In making its decision in the *Deitch* case, the Pennsylvania Supreme Court relied upon the definition of manufacturing set forth in *Commonwealth v. Berlo Vending Company*, 415 Pa. 101, 202 A.2d 94 (1964), and on page 93 of *Deitch* quoted that definition as follows:

> "'The meaning of "manufacturing" has been restated by this Court in Philadelphia School District v. Parent Metal Products, Inc., 402 Pa. 361, 364, 167 A.2d 257, 258-59 (1961), *"Manufacturing" as used in a legislative enactment is given its ordinary and*

general meaning. It consists in the application of labor or skill to material whereby the original article is changed into a new, different and useful article: Commonwealth v. Weiland Packing Company, 292 Pa. 447, 449, 141 Atl. 148 (1928); Pittsburgh v. Electric Welding Company, 394 Pa. 60, 145 A.2d 528 (1958). *Whether or not an article is a manufactured product depends upon whether or not it has gone through a substantial transformation in form, qualities and adaptability in use from the original material, so that a new article or creation has emerged:* General Foods Corp. v. Pittsburgh, 383 Pa. 244, 118 A.2d 572 (1955). If there is merely a superficial change in the original materials, without any substantial and well signalized transformation in form, qualities and adaptability in use, it is not a new article or new production: Commonwealth v. Weiland, supra; Pittsburgh v. Electric Welding Co., supra.'

'On the same day as the decision in Parent Metal Products Co., we also decided Philadelphia School District v. Rosenberg, 402 Pa. 365, 368, 167 A.2d 259-260 (1961), in which we emphasized that "it is the popular or practical understanding of what is 'manufacturing' that prevails and is intended." ' " (Emphasis supplied.)

The Commonwealth Court in its opinion found on page 11 (a) of Appellant's Jurisdictional Statement, quoted the above decisional definitions of the term and concluded thusly:

"Thus, the touchstone of the legal concept of the term 'manufacturing' is the application of skill and labor to original 'material' whereby it is substantially changed into a new, different and useful 'article'.

The traditional legal concept assumes tangible 'material' as a starting point, and a continuity of existence of that material into the final product.

"We therefore find crucial to our determination the fact, as the parties' stipulation and the testimony of taxpayer's expert witness point out, that the original material here, coal, is not material which survives in the new 'product'; coal is simply the chemical energy source from which the entire process of electric generation begins, and in the process it is consumed and discarded. The harnessing of heat energy from the coal fuel, its conversion into mechanical energy in the turbine and the final conversion to electrical energy in the form of an electric current, is hence not 'manufacturing' in the ordinary understanding of that term. Where no molecules of the original raw material survive in the final product, we thus do not have manufacturing in the judicial sense of 'application of labor or skill' to 'material'.

"We recognize that, in this electronic age, it may be scientifically myopic to recognize only continuity of tangible material and to ignore the equally real—although less tangible—continuity of elemental energy. However, we are construing legislation and therefore believe that the legislature intended to use the ordinary (and perhaps more easily applied) concept of tangible material. Until the legislature expressly indicates an intent to embrace more scientific concepts, we must assume adherence to 'the popular and practical understanding,' as the Supreme Court said in Deitch, supra and Berlo Vending, supra."

The basic premise of the Court's opinion was that no new product was created by the generation of electricity.

Energy which was inherent in the raw material used to produce the steam, i.e. coal, was unlocked and through a chemical and physical change this heat energy was converted into electrical energy; however, no new product was created. The Appellant started with energy and ended with energy in a different form; hence, there was no manufactured product as the term has been defined by the courts of Pennsylvania.

The Commonwealth submits that, since the definition of manufacturing is a court determined definition, equal protection is not violated unless the Appellant could show that the Pennsylvania courts vary the definition as it applied to foreign and domestic corporations to favor one over the other. All corporations generating electricity in Pennsylvania have been treated the same, i.e., the manufacturing exemption has been denied, hence, there can be no violation of equal protection.

Appellant's assertion that the Pennsylvania courts held that generating electricity was not manufacturing because of the adverse fiscal impact on Commonwealth's revenues by an opposite holding is without foundation. The court's decision is amply based on a comprehensive review of the decisional definition of manufacturing. Appellant's claim that the Act of July 1, 1978, P.L. 594, specifically denying the exemption to "companies as enjoy or exercise the right of eminent domain" aids its cause is without merit. The purpose of the amendment was obviously to limit the fiscal impact on the state, certainly a valid legislative purpose. However, the recognition by the Legislature that an adverse decision by the court in Appellant's case does not in any way indicate that the court's ultimate decision that a generator is not entitled to the manufacturer's exemption was based on fiscal impact.

The fact that the legislation takes away the potential claim by generators of electricity retroactive to the furthest constitutional date by its very terms cannot violate any constitutional protection that taxpayers enjoy with respect to retroactive legislation. The legislation itself limited the retroactive feature to the furthest constitutional date without specifying what that date would be. Since our court held that generators were not entitled to the manufacturer's exemption, there was no need for the court to decide what the furthest retroactive taxation could be. Obviously, a statute which by its very terms refers to the Constitution and limits its effect to whatever is constitutional, cannot be unconstitutional. Further, the Courts of Pennsylvania did not in their opinion rely on this provision because they decided that the taxpayer was not entitled to the exemption on other grounds, i.e., that generating electricity is not manufacturing. Hence, appellant's contention that a substantial federal question is presented by this appeal is without merit.

The denial of the exemption to electric generating companies under Pennsylvania law has been uniform since at least 1891 when in the case of *Commonwealth v. Northern Electric Light & Power Co.*, 145 Pa. 105 (1891), the Pennsylvania Supreme Court concluded that under a previous Capital Stock Tax Act electric generating corporations were not entitled to the manufacturing exemption. Appellant's argument that equal protection is here violated because the courts of Pennsylvania have not applied the manufacturing exemption to it in the same manner that it was applied to other taxpayers over the past 50 years is wrong. The Commonwealth submits that the courts of Pennsylvania have been consistent in their application in all instances.

In *Commonwealth v. Keystone Electric Light, Heat and Power Company,* 193 Pa. 245, 251 (1899), the Pennsylvania Supreme Court stated that the holding of the *Northern Electric* case was as follows:

> ". . . Electric light, heat and power companies are manufacturing corporations within the meaning of the act of 1874 and its supplements. They are not exempt from a tax on their capital stock under section 20 of the act of 1885, because they are not *within the policy of the legislature* in passing that act, and it was not intended that they should share in its benefits. . . ." (Emphasis supplied.)

Parenthetically, it must be noted that this legislative policy has never wavered or been changed for over three quarters of a century.

The first time that a court was asked to construe the manufacturing exemption, contained in the Act of 1889, a successor Capital Stock Tax Act as it relates to electric generating corporations, was in the case of *Commonwealth v. The Edison Electric Light & Power Co. of Erie,* 1 Dauph. 127 (1895). In discussing its decision, the Court of Common Pleas of Dauphin County stated at page 128 as follows:

> "Neither, as already stated, is there any material difference between the exempting clause of the Act of 1885 and the similar clause in the Acts of 1889 and 1891. Whatever difference may exist makes against the defendant; for, as is well known to all who are familiar with legislative and judicial controversy over these clauses, the language of the later acts is intentionally more restricted than the language of the earlier act that was ineffectively invoked by the Northern Electric Co."

The court stated its conclusion on page 182 as follows:

> ". . . If the unqualified language of the Act of 1885, namely: 'manufacturing corporations' did not include a corporation such as the defendant, [an electric generating company], we do not think any fair process of construction can read it into the narrower phrase used by the Acts of 1889 and 1891, namely: 'corporations, limited partnerships and joint stock associations organized exclusively for manufacturing purposes and actually carrying on manufacturing within the state. . . ."

The Act of 1891, referred to in the two quotations above, related to an amendment to the Act of 1889 which made no change in the exemption provision with which we are herein concerned. This case was appealed to the Pennsylvania Supreme Court and was affirmed, per curiam, at 170 Pa. 231 (1895). It is significant that the manufacturing exemption was denied to an electric generating corporation under the Act of 1889 without the courts' opinions making any reference to the corporation's possessing the right of eminent domain, or the Act's prohibiting the exemption to corporations possessing the right. In other words, eminent domain was not a factor in the courts' decision.

The line of cases cited above laid to rest the question of whether electric generating corporations were entitled to the manufacturing exemption under the Act of 1889 and its many amendments. Even though it was not the direct question at issue, in *Commonwealth v. American Car and Foundry Co.*, 203 Pa. 302 (1902), the *Northern Electric* holding was again commented upon favorably. In reaching its conclusion that the Act of 1889 does not show

that the General Assembly did not include foreign corporations within the class of corporations entitled to the manufacturing exemption, at page 305 the Dauphin County Court stated:

> "If the question in this case were whether an electric light, heat and power company were exempt from the tax on capital stock we would, of course, unhesitatingly follow the precedent of the Northern Electric Light case and decide it was not. But the electric light cases are not authority for cases involving the question of the right of other companies to the exemption."

Thereafter, it was accepted by the taxpayers of the Commonwealth that electric generating corporations were not entitled to the manufacturing exemption as a matter of the public policy of the General Assembly, and the manufacturing exemption was never intentionally granted to an electric generating corporation by the taxing officials of the Commonwealth.

The pertinent portions of the Act of August 31, 1971, P.L. 362, do not differ in any material respect from the manufacturing exemption provision included in the Act of 1889 or from the provisions reintroducing the exemption in the Act of 1943. Nowhere in the Act of August 31, 1971 or in any other official publication of the General Assembly is there any indication that it was the intention of the General Assembly to change the public policy concerning the applicability of the manufacturing exemption to electric generating corporations.

Since all electric generating companies, both foreign and domestic, have consistently been denied the manufacturing exemption in Pennsylvania, there has not been

any discrimination so as to violate the Equal Protection Clause.

It is clear that under the Equal Protection Clause of the Federal Constitution, all that is required is uniformity of tax burden upon the person or corporation upon which the tax is assessed; in other words, there is nothing which prevents classification which is based upon well founded reason, if those within the class share its equal tax burden. The Constitution exacts, not uniformity of taxing laws, but uniformity of tax. Since all generators, both domestic corporations and foreign corporations, of electricity are denied the manufacturing exemption, there has been no violation of equal protection in this instance; hence, no federal question is presented by this appeal.

The Commonwealth submits that the denial of the manufacturing exemption to the generators of electricity does not violate the Equal Protection Clause of the 14th Amendment to the United States Constitution because the exemption is denied to all companies generating electricity, both domestic and foreign, and the application of this exemption by the courts of Pennsylvania has been consistently followed for many years.

It is clear that since Pennsylvania has chosen not to exempt any generator of electricity from tax, there can be no denial of equal protection.

B. Even if this Court finds that a substantial federal question is raised by the appeal, it should still be dismissed because the Appellant has not properly preserved the federal question.

The taxpayer did raise in its appeal and specification of objections, as pointed out in its brief, the federal constitutional protections that it is claiming were violated in this appeal. The Appellant did not brief or argue these questions before the lower court. Further, its exceptions to the lower court's opinion, attached as "Appendix A" to this brief, did not properly preserve this issue. The exceptions only referred to the Equal Protection Clause in one paragraph and limited that reference to the "eminent domain issue" which was not considered by the Pennsylvania courts. Appellant's Exception No. 11 reads as follows:

> "Assuming arguendo that the right of eminent domain, its enjoyment and exercise, *are relevant or material to this case,* Taxpayer excepts to your Honorable Court's refusal to rule that, as a matter of law, the General Assembly's attempt to make retroactive to calendar year 1972 the provisions of section 2 of the Act of July 1, 1978, P.L. 594, relating to amendments to subsections (a) and (b) of section 602 of the Tax Reform Code of 1971, is a denial of due process, violating the due process clauses of the Fourteenth Amendment to the United States Constitution and of Article I, sections 9 and 10 of the Pennsylvania Constitution, and also violates the uniformity clause of the Pennsylvania Constitution, Article 8, section 1 and the equal protection clause of the Four-

teenth Amendment to the United States Constitution." (Emphasis supplied.)

The Equal Protection Clause objection was raised only in connection with the eminent domain argument that was never reached by the Pennsylvania courts which held Appellant was not entitled to the manufacturing exemption because generating electricity is not manufacturing and not because the Appellant possessed or enjoyed the power of eminent domain.

The Commonwealth submits that the Pennsylvania Supreme Court could not have considered the equal protection argument raised by the Appellant in this appeal because it was not preserved by appropriate exceptions. Since the Pennsylvania Supreme Court could not properly consider this question, the Commonwealth submits that this Court cannot consider it because of Rule 16 (a) and (b) of the Rules of the Supreme Court of the United States which provide:

> "(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or *with these Rules.*
>
> "(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; *or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on;* or that the judgment rests on an adequate non-federal basis." (Emphasis supplied.)

In the instant case, the Pennsylvania Supreme Court could not have passed on this question unless it first determined that the question of "eminent domain" was germane

to the case. Neither the lower court nor the Pennsylvania Supreme Court ever reached this question because they held that generating electricity was not manufacturing without regard to the question of eminent domain.

C. The judgment here appealed from rests on an adequate non-federal basis.

The judgment entered by the Commonwealth Court, affirmed per curiam by the Pennsylvania Supreme Court, rests on the question of whether or not the generation of electricity is manufacturing within the meaning of that term in Pennsylvania corporate taxation. Since the decision is based on Pennsylvania court definitions uniformly applied to all taxpayers, both foreign and domestic, for almost 100 years, there is obviously a non-federal basis for the decision, and in accordance with Rule 16 (b), supra, of the Rules of the United States Supreme Court this appeal should be affirmed or dismissed.

CONCLUSION

For the foregoing reasons, the Commonwealth's Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1315 C.D. 1975

Commonwealth of Pennsylvania Board of Finance and Revenue,

Appellee

v.

The Potomac Edison Company,

Appellant

EXCEPTIONS OF APPELLANT

AND NOW, this 25th day of March, 1980, Appellant, The Potomac Edison Company (hereinafter "Taxpayer"), by its attorneys, Shearer, Mette & Woodside, excepts to your Honorable Court's Findings of Fact, Conclusions of Law, Opinion and Order and to the failure of your Honorable Court to hold in accordance with the positions advanced by Taxpayer in its Brief and oral argument, and specifies its exceptions as follows:

1. The Findings of Fact contained in paragraph 2 on page 1 of the Opinion are incomplete and therefore incorrect. Taxpayer is a Maryland corporation providing

electricity service to the public only in Maryland. Taxpayer provides no electricity service to the public in Pennsylvania. At all times material to this case, Taxpayer's only activity in Pennsylvania was its undivided 20% ownership as tenant in common in the coal-fired, steam-driven electric power plant at Hatfield's Ferry Power Station (hereinafter the "power plant"), its underlying real property and its electricity output. The other tenants in common with Taxpayer were Monongahela Power Company and West Penn Power Company. West Penn Power Company operated the power plant. At all times material to this case, Taxpayer had no service territory or customers in Pennsylvania. From its share of the power plant's output, Taxpayer furnished electric service to its customers in Maryland. (Partial Stipulation of Facts I ¶8, Ex. E; Tr. 46).

2. Taxpayer excepts to your Honorable Court's Finding of Fact contained in paragraph 11 on page 5 of its Opinion that "the production of electricity is not manufacturing." The uncontroverted testimony of Howard B. Hamilton, P.E. at trial established that electricity is manufactured at the power plant. (Tr. 8-9, 11, 14-16, 18).

3. Taxpayer excepts to your Honorable Court's Conclusion of Law (at pages 3-5 of the Opinion) that Pennsylvania case law has not determined, conclusively, that the production of electricity is manufacturing. This Conclusion of Law is contrary to case law decided not only by your Honorable Court but also by the Pennsylvania Supreme Court and the overwhelming majority of appellate courts in other states. In *Commonwealth of Pennsylvania v. Philadelphia Electric Company*, 21 Commonwealth Ct. 593, 347 A.2d 494 (1975), reversed on other grounds, 472 Pa. 530, 372 A.2d 815 (1977), your Honor-

able Court ruled that the production of electricity through steam generators, nuclear power plants, hydroelectric dams, diesel turbines, and pump storage projects constitutes manufacturing. In *Golden Triangle Broadcasting, Inc. v. City of Pittsburgh,* 31 Commonwealth Ct. 547, 558, 37 A.2d 839, 844, 845 (1977) your Honorable Court decided to "accept that *Southern Electric, supra* [191 Pa. 170 (1899)], and *Keystone Electric, supra* [193 Pa. 245 (1899)], hold that the production of electricity, which could be considered an intangible, is 'manufacturing'." See also, case law cited in Taxpayer's Brief, at 19-23, 31-36 and Appendix I.

4. Taxpayer excepts to your Honorable Court's holding, at page 5 of the Opinion, "that an electric company is not entitled to the manufacturing exemption because the production of electricity is not manufacturing." This holding contravenes the case law, the stipulated facts and the trial testimony.

5. Taxpayer excepts to your Honorable Court's Conclusion of Law in paragraph 16 on page 9 of the Opinion that "[w]here no molecules of the original raw material survive in the final product we thus do not have manufacturing in the judicial sense of 'application of labor or skill' to 'material'." The case law definition of the term "manufacturing" contains no requirement that molecules of the original raw material survive in the final product in order for a process to constitute "manufacturing".

6. Assuming *arguendo* that "molecules of the original raw material" are required to "survive in the final product" in order for a process to constitute "manufacturing", Taxpayer excepts to your Honorable Court's refusal to rule and to find as a fact that the production of electric-

ity at the power plant satisfied this requirement. Dr. Hamilton so testified at trial on direct and on cross-examination. (Tr. 13-14, 16-17, 22-23) His testimony is uncontroverted.

7. Taxpayer excepts to your Honorable Court's refusal to find as a fact that electricity is manufactured at the power plant and to your Honorable Court's refusal to hold as a matter of law that the manufacture of electricity at the power plant qualifies Taxpayer for the manufacturing exemption from franchise tax for the second six months of 1972.

8. Taxpayer excepts to your Honorable Court's refusal to grant Taxpayer the manufacturing exemption from franchise tax for the second six months of 1972.

9. Taxpayer excepts to your Honorable Court's refusal to rule that, as a matter of law, the right of eminent domain, its enjoyment and exercise, are not relevant or material to this case.

10. Assuming *arguendo* that the right of eminent domain, its enjoyment and exercise, are relevant or material to this case, Taxpayer excepts:

(a) to your Honorable Court's refusal to rule and to find as a fact that Taxpayer did not enjoy the right of eminent domain in Pennsylvania; and

(b) to your Honorable Court's refusal to rule and to find as a fact that Taxpayer did not exercise the right of eminent domain during 1972 in any jurisdiction.

11. Assuming *arguendo* that the right of eminent domain, its enjoyment and exercise, are relevant or material to this case, Taxpayer excepts to your Honorable

Court's refusal to rule that, as a matter of law, the General Assembly's attempt to make retroactive to calendar year 1972 the provisions of section 2 of the Act of July 1, 1978, P.L. 594, relating to amendments to subsections (a) and (b) of sections 602 of the Tax Reform Code of 1971, is a denial of due process, violating the due process clauses of the Fourteenth Amendment to the United States Constitution and of Article I, sections 9 and 10 of the Pennsylvania Constitution, and also violates the uniformity clause of the Pennsylvania Constitution, Article 8, section 1 and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

12. Taxpayer excepts to your Honorable Court's failure to rule inadmissible at trial the testimony of John D. Grove and Commonwealth's Exhibit No. 1. That testimony and exhibit are irrelevant and immaterial at bar and lack foundation. Taxpayer excepts to your Honorable Court's failure to strike and to expunge that testimony and exhibit from the Record.

13. Your Honorable Court's Opinion and Order are against the law.

14. Your Honorable Court's Opinion and Order are against the stipulated facts and the trial testimony.

15. Taxpayer excepts to your Honorable Court's refusal to resettle Taxpayer's franchise tax liability to the Commonwealth of Pennsylvania at $48,877.50 (which already has been paid) and to your Honorable Court's failure to enter judgment in favor of Taxpayer and against the Commonwealth of Pennsylvania in the amount of $16,485.60 representing a refund or credit to Taxpayer of its overpayment of its 1972 franchise tax liability to the Commonwealth of Pennsylvania.

16. Taxpayer excepts to your Honorable Court's proceeding to enter judgment in favor of the Commonwealth of Pennsylvania and against Taxpayer as follows:

> "$97,755.00 of which $65,363.10 has been paid by Taxpayer. The remainder shall be paid with interest as provided by law."

17. Taxpayer excepts to your Honorable Court's entering the following Order:

> "AND NOW, this 10th day of March, 1980, unless exceptions are filed within 30 days of the date hereof, the Order of the Board of Finance and Revenue is affirmed. Judgment is entered in favor of the Commonwealth of Pennsylvania and against Potomac Edison Co., with interest, in the amount stipulated by the parties in their Stipulation of Facts I dated May 4, 1979 ($97,755.00 of which $65,363.10 has already been paid).
>
> /s/ David W. Craig
> David W. Craig, Judge"

Respectfully submitted,

(s) Lloyd R. Persun
Lloyd R. Persun

(s) Howell C. Mette
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The Potomac Edison Company

March 25, 1980

PROOF OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing Exceptions upon the following person and in the manner indicated below, which service satisfied the requirements of Pa. R.A.P. 121 and 2187:

Service by first class mail addressed as follows:

Eugene J. Anastasio, Esquire, Deputy Attorney General, Department of Justice, Tax Litigation Unit, Strawberry Square—15th Floor, Harrisburg, Pennsylvania 17120

Lloyd R. Persun
Lloyd R. Persun
Attorney for Appellant,
The Potomac Edison Company

Dated: March 25, 1980